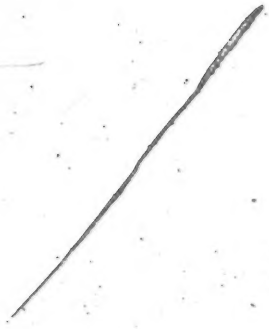

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 1008

THE COLORADO NATIONAL BANK OF DENVER AND GERTRUDE HENDRIE GRANT, EXECUTORS OF THE ESTATE OF EDWIN B. HENDRIE, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 28–30) is not reported. The opinion of the court below (R. 53–59) is reported in 95 F. (2d) 160.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 31, 1938 (R. 60). A petition

for rehearing was filed by the taxpayer on Ma
1938 (R. 65–67), and was denied April 4,
(R. 69). The petition for a writ of certiora
filed May 2, 1938. The jurisdiction of this
is invoked under Section 240 (a) of the Ju
Code as amended by the Act of February 13,

QUESTION PRESENTED

Whether there was any evidence to sustai
Board of Tax Appeals in reversing the Co
sioner's determination that the decedent's ir
cable transfer, effected by a declaration of
dated January 7, 1927, was made in contempl
of death within the meaning of Section 302 (
the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are
forth in the Appendix, *infra*, pp. 12–14.

STATEMENT

The facts were stipulated (R. 35–50), and
summarized and found by the Board of Tax
peals (R. 28–29), as follows:

The decedent, Edwin B. Hendrie, died on J
15, 1932, at the age of 85 years and 6 months.
established a trust on January 7, 1927, when
was 80 years of age. He was then in good hea
The trust was irrevocable. The trust instrum
provided that the income of the trust should be
cumulated during the lifetime of the donor

added to the corpus, that "after the death of the Donor the net income from all of the trust estate, or so much thereof as Gertrude Hendrie Grant, daughter of the Donor may call for, shall be paid to her by the Trustee so long as she shall live" while that not called for should be added to the corpus, and that the corpus was to go to the children of Gertrude Hendrie Grant at her death. The trust contained a provision against anticipation by any beneficiary. (R. 28.)

The decedent discussed with the trust officer of a bank, in the latter part of 1926, the purposes and details of the trust which he proposed to establish. He said he wanted to transfer about one-third of his assets in the interest of his daughter and her heirs so that whatever might happen to his own financial affairs in the future, those persons would be provided for. (R. 29.) He said he desired to retain for himself his more speculative securities and to feel free to speculate with that property during the rest of his life, but to put the other one-third beyond his own reach and risk. He said he desired and intended to "play on the market" to a greater extent and in a more speculative way for the remainder of his life. The only evidence that the daughter or her husband ever knew of the trust is a statement which the decedent made in 1930 to the husband that his (Hendrie's) daughter and grandchildren would be adequately provided for, in the event of his death, through the medium of a trust which he

had created and which would not be affected by his operations on the stock market. It does not appear that the daughter knew the details of the trust prior to her father's death. (R. 29.)

The decedent's will was dated January 26, 1925. It provided that the bulk of his estate should be placed in trust for the benefit of his daughter and her children with remainders to the children. (R. 29.)

On the basis of the foregoing facts, the Board decided in favor of the taxpayer, and the Commissioner thereupon petitioned for review. The court below reversed.

ARGUMENT

In 1927 the decedent transferred one-third of his property in trust with the proviso that the income therefrom should be accumulated and added to the corpus during his lifetime, and that after his death, the income should be paid to his daughter for life, and thereafter the corpus to her children (R. 28–29). He thereby accomplished the same purpose as he had previously by will in 1925, wherein he had provided that the bulk of his estate should be placed in trust for the benefit of his daughter and her children (R. 29, 47–50). The provisions of the will, dated January 26, 1925 (Ex. G, R. 47–50), and the trust instrument of January 7, 1927 (Ex. B, R. 10–15), are strikingly similar.

The Commissioner determined that the decedent transferred the property in trust in contemplation of death, and therefore he included it

in the latter's gross estate under the provisions of Section 302 (c) of the Revenue Act of 1926, *infra* (R. 8-9, 28). Although recognizing the presumptive correctness of the Commissioner's determination, petitioners contended before the Board that the donor's dominant motive in effecting the trust was connected with life, not with the thought of death (R. 29). The Board, finding that the transfer was not made in contemplation of death, upheld their contention (R. 30).

The court below, however, held that it was clear the decedent had made the transfer in contemplation of death, since his purpose to insure provision for his daughter and her children upon his death, in the event that he lost the balance of his property in the speculations which he was about to undertake, was a purpose desirable to him in the event of his death. To accomplish the result intended, he changed his will, in which he had set up a testamentary trust, and in place thereof made the transfer in trust *in praesenti*. The reason for making the substitution, asserted by the petitioners, is that the decedent desired to speculate. But this was not the reason for making the gift, but only for making it in the form of a trust instead of a will. Since the trust was made in lieu of the will, it was clearly a *pro tanto* substitute for the prior testamentary disposition of the property.

The petitioners contend (Pt. 6) that the holding of the court below is in conflict with holdings of this Court and of other Circuit Courts of Appeals in *Shukert* v. *Allen*, 273 U. S. 545; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*,

281 U. S. 238; *Becker* v. *St. Louis Union Trust*
296 U. S. 48; *Commissioner* v. *McCormick*, 43
(2d) 277 (C. C. A. 7th), *rev'd*, 283 U. S. 784,
Welch v. *Hasset*, 90 F. (2d) 833 (C. C. A. 1st), *af*
302 U. S. —, because in those cases, petitioners c
tend, it was held that postponement of the ben
ciaries' use and enjoyment did not make the gi
there in question taxable under that portion of
Section requiring the inclusion in the decedent
gross estate of transfers made to take effect in p
session or enjoyment at or after death.

It should suffice in answer to point out that t
decision below did not proceed upon that basis, b
upon the basis that the evidence conclusively esta
lished the decedent had his death in mind, in th
the generating motive for the transfer was not or
to provide for his daughter and her children at h
death, but to *insure* that such provision would
made for them at that time. The tax upon t
transfer was not sought to be justified below, a
is not sought to be justified here, because the ben
ficiaries' right to the use of the income was wit
held or postponed during the decedent's lifetim
but because the nature of the transfer and th
motive which actuated it compelled the conclusio
that the transfer was made in contemplation o
death. The decedent's desire to speculate fre
from the danger of being unable, as a result thereo
to provide for his daughter and her children at h
death was merely the occasion or circumstanc

which led him to such contemplation, and not the motive for making provision for his daughter and her children.

Nothing that was said in *United States* v. *Wells*, 283 U. S. 102, justifies a contrary view. That case stands for the simple proposition that, acting within the scope of its obvious powers, Congress provided that *inter vivos* transfers made in contemplation of death should be included in the gross estate in order to prevent tax avoidance by a resort to mere substitutes for testamentary dispositions. As the Court said in that case (p. 116):

> The dominant purpose [of the statute] is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax.

Thus the definition of "in contemplation of death", as used in the statute, is not to be restricted to the state of mind of one who makes a transfer in fear of impending death, either as a result of old age or illness, but includes as well the state of mind of one who makes a testamentary disposition, and hence one who makes a substitute therefor, wholly irrespective of his age or state of health. If a testamentary disposition is defined as one intended to provide for the objects of the testator's bounty at death, then clearly a substitute therefor is one which is intended to accomplish the same purpose, even though title is presently transferred.

It follows that, if we are here dealing with such a substitute, it falls within the statute; and we sub-

mit that there can be little doubt that we are. T
most cursory consideration of the context of t
transfer here leaves no doubt on that score. F
aside from the fact that it reproduced the de
dent's previous testamentary trust, it was obviou
intended, just as that trust had been, to make p
vision for the natural objects of his bounty at
death. The existence of the testamentary pu
pose for the transfer would therefore appear to
beyond dispute, even if the decedent had not e
pressly stated that his purpose was to insure pr
vision for his daughter and her children at h
death (R. 29). If the *Wells* case teaches, as w
understand it does, that the trier of the fact mu
ascertain the manifest purpose of the transf
and, having done so, give effect to th
purpose, it necessarily follows that the Board
decision was in error. For it mistook the me
circumstance or occasion which gave rise to a reco
sideration of the means which would most certain
accomplish the decedent's purpose, in the situatio
then facing him, for the motive which induced hi
to make provision for his daughter and her chi
dren, namely, to insure them a competence at h
death. The result was that the Board considere
the decedent's health, and the fact that he was no
in fear of impending death, controlling. It is pr
cisely this error which the court below correcte

It is well settled that a gift is made in contem
plation of death where the donor's dominant motiv

is to make proper provision for his dependents after his death. See *Igleheart* v. *Commissioner*, 77 F. (2d) 704 (C. C. A. 5th); *Updike* v. *Commissioner*, 88 F. (2d) 807 (C. C. A. 8th). Or, as stated by the court below (R. 57), a transfer motivated by the same considerations as those which prompt testamentary disposition of property before death will support the tax. *United States* v. *Wells*, *supra*; *Heiner* v. *Donnan*, 285 U. S. 312; *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48; *Willcuts* v. *Stoltze*, 73 F. (2d) 868 (C. C. A. 8th); *Igleheart* v. *Commissioner*, *supra*. Since the generating motive for the transfer here in question—namely, presently to make sure provision for his daughter and her children at his death against the possibility that losses resulting from the speculation he was about to undertake might otherwise leave him unable to do so at that time—was beyond peradventure one associated with death, it follows that it was made in contemplation of death within the meaning of the statute (*United States* v. *Wells*, *supra*; *Igleheart* v. *Commissioner*, *supra*; *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. (2d) 916 (C. C. A. 2d), certiorari denied, 293 U. S. 565), as the court below properly held (R. 58–59).

It is therefore clear that the court below did not err or exceed its powers in setting aside the Board's finding that the transfer was not made in contemplation of death, for such finding was not

supported by any substantial evidence. The facts were stipulated (R. 35–38), and the pertinent facts were covered by the Board's findings set forth in the opinion as stipulated (R. 28–29). Their sufficiency to support the Board's decision raised a question of law reviewable by the court below. *Helvering* v. *Rankin*, 295 U. S. 123; *Kaufmann* v. *Commissioner*, 44 F. (2d) 144 (C. C. A. 3d); *St. Paul Abstract Co.* v. *Commissioner*, 32 F. (2d) 225, 226 (C. C. A. 8th); *Norfolk Nat. Bank of C. and T.* v. *Commissioner*, 66 F. (2d) 48 (C. C. A. 4th). For whether there is any substantial evidence to support the Board's finding is a question of law. *Folk* v. *Commissioner*, 67 F. (2d) 779 (C. C. A. 10th). The court below did not weigh the evidence or make its own findings as was done by the appellate court in *McCaughn* v. *Real Estate Co.*, 297 U. S. 606. It was clearly within the province of the court below to determine whether there was any evidence to support the Board's finding and to set it aside if unsupported. *Champlin* v. *Commissioner*, 71 F. (2d) 23 (C. C. A. 10th). It did so only because, upon a complete review of the evidence (R. 55–56), it failed "to find any substantial evidence that the transfer under consideration was not made in contemplation of death within the meaning of the statute" (R. 59). This disposes of the petitioners' contention (Br. 24–27) that the court below exceeded its power in overturning the Board's finding.

CONCLUSION

It is, therefore, respectfully submitted that the decision of the court below is not in conflict with either the applicable decisions of this Court or those of other Circuit Courts of Appeals, and that the court below committed no error in reversing the decision of the Board of Tax Appeals on the facts in the case. The petition should, therefore, be denied.

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Special Assistants to the Attorney General.

MAY 1938.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * (U. S. C., Title 26, Section 411).

Pub. Res. No. 131, approved March 3, 1931, c. 454, Stat. 1516:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from,

the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth." (U. S. C., Title 26, Sec. 411.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 803. FUTURE INTERESTS.

(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the mean-

ing of this title." (U. S. C., Title 26, Section 411.)

Treasury Regulations 80 (1934 Ed.):

ART. 16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

A transfer in contemplation of death is a disposition of property prompted by the thought of death. The phrase "contemplation of death" as used in the statute is not limited to contemplation of imminent death or to an apprehension that death is near at hand. Death must be "contemplated," that is, the motive which induces the transfer must be such that leads to testamentary disposition. A gift inter vivos which springs from a motive essentially associated with life rather than with death is not made in contemplation of death.

* * * * *

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